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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. 73-959

CHARLES FRIEND,
Petitioner,

-vs-

IRWIN R. LIPPMAN, THOMAS A. WADDELL, and THOMAS D. O'MALLEY, JR., Individually and as INSURANCE COMMISSIONER and TREASURER of Florida, and ROYAL INDEMNITY COMPANY, a foreign corporation,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPINION BELOW

The decision of the District Court of Appeal of Florida, First District, sought to be reviewed in this Court is reported at 277 So. 2d. 318. A copy thereof is attached as Petitioner's Appendix No. 1.

JURISDICTION

The Court is without jurisdiction for any one of the following reasons:

(1) The petition does not present a substantial federal question.

(2) The federal question sought to be reviewed was not timely or properly raised, or expressly passed on in the state courts.

(3) The judgment below rests on a sufficient non-federal basis.

QUESTION PRESENTED

Whether Petitioner has shown special and important reasons why the Court should grant his petition for writ of certiorari.

STATEMENT OF CASE AND FACTS

Petitioner instituted suit below seeking compensatory and punitive damages in tort against Respondent O'Malley, Treasurer and Insurance Commissioner of the State of Florida, and his bonding company, Royal Indemnity Company, also Respondent herein. The complaint (attached as Respondent's Appendix No.1) did not seek injunctive or declaratory relief. Petitioner principally alleged in his complaint that Respondent O'Malley and his subordinates removed him from his position as Director of the

Division of Rehabilitation and Liquidation of the Insurance Department because Petitioner refused to commit illegal acts at the command of Respondent.

After permitting, by its order of February 4, 1972, the filing of an amended complaint, (attached as Respondent's Appendix No.2) the trial court on March 13, 1972, dismissed Petitioner's amended complaint with prejudice. (A copy of this order is attached as Petitioner's Appendix No.2) On March 22, 1972, Petitioner filed a motion for rehearing and for leave to amend in the trial court. (attached as Petitioner's Appendix No.3) The trial court on April 12, 1972, denied Petitioner's motion for rehearing and for leave to amend, (attached as Petitioner's Appendix No.5) since the proposed amended complaint reflected the same infirmities as the previously dismissed complaint. Accordingly, Petitioner was not given leave to file his proposed amended complaint. (attached as Petitioner's Appendix No.4)

The decision of the trial court dismissing the amended complaint with prejudice was predicated on the finding that Petitioner was exempted from state career service protection pursuant to §110.051(2)(h), Florida Statutes, and therefore since Petitioner had no tenure or expectancy of continued employment, he could be terminated at will and without cause. Accordingly, the trial court held that action for damages against Respondents would not lie.

Petitioner subsequently appealed the trial court's ruling to the Florida District Court of Appeal, First District. The appellate court affirmed the decision of the trial court on issues of state law without passing over any federal constitutional question. (attached as Petitioner's Appendix No.1) The Florida First District Court of Appeal treated the case solely as one involving tort liability arising out of removal of Petitioner from his position.

After Petitioner failed to gain review by way of writ of certiorari in the Florida Supreme Court, he now petitions this Court.

ARGUMENT

PETITIONER FAILS TO PRESENT TO THE COURT A SUBSTANTIAL FEDERAL QUESTION.

"This court is always wary of assuming jurisdiction of a case from a state court unless it is plain that a federal question is necessarily presented, and the party seeking review here must show that we have jurisdiction of the case." Mental Hygiene Dept. of California v. Kirchner, 380 U.S. 194, 197-198(1965). Accordingly, it is clear that Petitioner must affirmatively show the Court a basis for its jurisdiction.

Petitioner's sole asserted ground for the Court's jurisdiction is 28 U.S.C. §1257(3). Petitioner presents to the

Court (at p.2 of his petition) the question "whether the State may require an employee to refrain from exercising his constitutional rights of freedom of speech, freedom to follow his profession, or others . . . ." However, before reaching the merits of this contention, the Court must consider in what manner the question was resolved in the State courts below.

At no time prior to Petitioner's proposed amended complaint, in which leave to file was denied by the trial court, did Petitioner ever raise the question whether his federal constitutional rights had been abridged by action of Respondent O'Malley. This Court, in dismissing a petition for writ of certiorari for want of jurisdiction, held that in order that the denial of a federal right may be the basis of reviewing the judgment of the state court, the claim of federal right must be made in the state court in the manner required by state practice, and unless there is an unwarranted resort to rules of practice by the state court to evade decision of the federal question, this Court will not review the judgment. Louisville and Nashville Railroad Co. v. Woodford, 234 U.S. 46(1914). The Court further stated at p. 51:

> The decisions of this Court not only have repeatedly held that a federal right in order to be reviewable here must be set up and denied in the state court, but have often held that such claim of denial is not properly brought

to the attention of this Court where it appears that the state court declined to pass upon the question because it was not raised in the trial court as required by the state practice. (Citations omitted) Id.

Similarly, in Bowe v. Scott, 233 U.S. 658,663 (1914), the Court, in dismissing for want of jurisdiction, ruled that

> . . . it is elementary that a mere assertion in a state court of a right under the Constitution of the United States in a petition for rehearing affords no ground for invoking the jurisdiction of this Court unless the Court below in dealing with the petition for rehearing considers and passes upon the federal ground therein relied upon, we dismiss that subject from view and come to consider whether the record otherwise discloses that a federal question was so raised below as to suggest jurisdiction. (Emphasis added)

Accordingly, it is clear that not only does the petition for writ of certiorari fail to affirmatively show sufficient grounds for the Court's jurisdiction, but it is additionally clear that, in view of the decisions in this case by the Florida courts, no federal constitutional question was ever properly or timely raised by Petitioner. See Bilby v. Stewart, 246 U.S. 225 (1918). Since there was no "right, privilege, or immunity . . . specially

set up or claimed under the Constitution, treaties, or statutes of . . . the United States", 28 U.S.C. §1257(3), the petition for writ of certiorari must be denied.

Moreover, not only has Petitioner failed to properly or timely raise any constitutional right he might have had in the state court proceedings, but in addition, it is readily apparent from the record that the judgment below rests on sufficient non-federal grounds.

The decision of the Florida First District Court of Appeal, which Petitioner seeks to have reviewed, expressly indicates two independent and adequate state grounds, to wit:

(1) Petitioner was exempted from career service protection pursuant to §110.051(2)(h), Florida Statutes, and therefore could be removed from his position at will and without cause.

(2) Respondent, a public official, having the authority to remove at will and without cause a subordinate such as Petitioner, is immune from tort liability.

Since the Florida judgment rests on independent and adequate state grounds, the Court must decline to review this petition. See Henry v. State of Mississippi, 379 U.S. 443 reh. den. 380 U.S. 926 (1965); Jankovich v. Indiana Toll Road Comm., 379 U.S. 487 (1965). Accord Herndon v. State of Georgia, 295 U.S. 441 (1935); Kirchner, supra.

Assuming, arguendo, that Petitioner has made a timely constitutional claim which has been passed upon by the Florida courts, the petition still fails to present a substantial federal question since the judgment below is manifestly correct.

In support of his petition for writ of certiorari, Petitioner cites to Perry v. Sinderman, 408 U.S. 593 (1972); Board of Regents v. Roth, 408 U.S. 564 (1972); and Pickering v. Board of Education; 391 U.S. 563 (1968). However, a perusal of these three cases will lead to the inevitable conclusion that they are not applicable here.

Petitioner's reliance on these three cases is misplaced since his action did not seek reinstatement but only damages arising out of tort. In fact, Roth, supra, cited by Petitioner, stands for the proposition that an untenured state college teacher has no constitutional right to a hearing when a university decides not to rehire him; a hearing is required only where the action of the state impinges upon his First Amendment interests. Respondent submits that no First Amendment right of Petitioner has been abridged here.

Moreover, if Petitioner merely asserts that the decision removing him was based on his constitutionally protected conduct, he does not have a due process right to some kind of hearing. Perry v. Sinderman, supra, at 599 n 5.

The Court's ruling in Roth makes it clear that a teacher is entitled to the procedural due process requirement of a hearing on the issue of reinstatement only where he is able to show a "liberty" or "property" interest protected by the Fourteenth Amendment. The Court in Roth at 577 stated:

> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . . (Emphasis added)

In view of the finding by the state courts below that Petitioner was not protected by the Florida career service act and therefore could be removed from his position at will and without cause, Petitioner was not entitled to a hearing before removal. In fact, Petitioner, in his reply brief at p.8 in the Florida District Court of Appeal, (attached as Respondent's Appendix No. 3) conceded that "(t)he right which was taken from [petitioner] was not a contractual or statutory right to employment."

CONCLUSION

In view of the foregoing arguments, it is clear that the petition for writ of certiorari fails to meet the requirements of 28 U.S.C. §1257(3) and Rule 23(F), Rules of Supreme Court. Accordingly, Respondent respectfully requests the Court, in exercise of sound judicial discretion, to decline

to review the case and deny the petition for writ of certiorari.

Respectfully submitted,

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